Divyyaa a/p Machap v Lembaga Kumpulan Wang Simpanan Pekerja

HIGH COURT (SHAH ALAM) — SUIT NO BA-22NCvC-503-12 OF 2022
CHOONG YEOW CHOY JC
18 JUNE 2024

Provident Fund — Beneficiary — Nomination — Deceased had two Employees Provident Fund ('EPF') accounts — Deceased made no nomination for first account but nominated a beneficiary for second account — EPF Board merged the accounts — Plaintiff being administratrix of deceased's estate filed action against EPF Board for merging the two accounts into a single account — Determination of legal questions under O 14A of Rules of Court 2012 — Whether letter of administration granted to plaintiff should take precedence considering that first account had no nomination — Whether second account which had a nomination to beneficiary was valid — Whether EPF Board vested with power to merge two accounts during lifetime of deceased — Employees Provident Fund Act 1991 — Employees Provident Fund Regulations 2001 regs 7(1) & 9(2)(a)(i) — Employees Provident Fund Rules 1991 — Probate and Administration Act 1959 — Rules of Court 2012 O 14A

Every contributor of the Employees Provident Fund ('EPF'), in the usual circumstance, would have one main account with the EPF, but the situation in the present case was a bit unconventional whereby the deceased had two accounts. There were funds remaining in the first account, but this first account had no nomination, unlike the second account which the deceased had nominated one Dharsyaini a/p Vijaya Kumar ('Dharsyaini') as the beneficiary but with no funds left. the plaintiff in the present case was the deceased's biological daughter as well as the administratrix of the deceased's estate vide letters of administration ('the LOA') granted by the Kuala Lumpur High Court. the plaintiff's action against the EPF Board ('the defendant') was attributed to the decisions of the EPF Board: (a) in merging the two accounts into a single account; and (b) that the nomination of the second account was deemed automatically the nomination for the first account. The effect of such decisions was that the monies that were originally in the first account were subject to a claim by both Dharsyaini and the plaintiff. The parties in the present case had agreed for the court to address several legal questions under O 14A of the Rules of Court 2012. There were eight questions raised but the court opined that the pivotal issues were encapsulated in questions 2, 3 and 4. The gist of the questions were as followed: (i) whether as the first account had no nomination, the LOA with the provisions of the Probate and Administration Act 1959 should take precedence ('question 2'); (ii) whether

the second account which had a nomination to Dharsyaini to receive the amount standing in credit in this account which was duly registered and retained for safekeeping by the EPF Board was valid ('question 3'); and (iii) whether the EPF Board was vested with the power to merge the two accounts during the lifetime of the deceased on discovering there were two accounts under the deceased's name ('question 4').

Held, dismissing the originating summons in encl 1 with no order as to costs:

(1) The nomination made in the second account was indeed valid as it was made in accordance with the provisions of the Employees Provident Fund Act 1991 ('the EPF Act'), the Employees Provident Fund Regulations 2001 ('the EPF Regulations') and the Employees Provident Fund Rules 1991 ('the EPF Rules'). Upon the examination of reg 7(1) of the EPF Regulations which provided for the cessation of nomination, the court agreed with the defendant that none of the circumstances as outlined in reg 7(1) had been triggered or invoked in the present case. Since the nomination remained valid, pursuant to reg 9(2)(a)(i) of the EPF Regulations, Dharsyaini was entitled to the balance sum in the first account when this account was merged with the second account. In view of the above, the court answered question 2 in the negative and question 3 in the affirmative (see paras 21, 23 & 25–26).

(2) In relation to question 4, while it was true that the EPF Act, the EPF Regulations, and the EPF Rules contained no express provisions granting the defendant the power to merge accounts, there were equally no provisions within these Act, Regulations, and Rules that prohibited such action. Therefore, the court concluded that the defendant was entitled to exercise its administrative powers to merge the said accounts. In relation to this, the defendant had no vested interest in the present suit. Its only concern was to perform its statutory duties as demanded of it (see paras 31 & 34).

[Bahasa Malaysia summary

Setiap pencarum Kumpulan Wang Simpanan Pekerja ('KWSP'), dalam keadaan biasa, akan mempunyai satu akaun utama dengan KWSP, tetapi keadaan dalam kes ini agak berbeza di mana si mati mempunyai dua akaun. Terdapat baki dana dalam akaun pertama, tetapi akaun pertama ini tidak mempunyai penamaan, tidak seperti akaun kedua yang si mati telah menamakan seorang Dharsyaini a/p Vijaya Kumar ('Dharsyaini') sebagai benefisiari tetapi tiada dana yang tinggal dalam akaun ini. Plaintif dalam kes ini ialah anak kandung si mati serta pentadbir harta pusaka si mati melalui surat kuasa mentadbir ('LOA') yang diberikan oleh Mahkamah Tinggi Kuala Lumpur. Tindakan plaintif terhadap Lembaga KWSP ('defendan') adalah disebabkan oleh keputusan Lembaga KWSP: (a) dalam menggabungkan kedua-dua akaun tersebut menjadi satu akaun; dan (b) bahawa penamaan

akaun kedua disifatkan secara automatik sebagai penamaan untuk akaun pertama. Kesan daripada keputusan sedemikian ialah wang yang pada asalnya berada dalam akaun pertama tertakluk kepada tuntutan oleh kedua-dua Dharsyaini dan plaintif. Pihak-pihak dalam kes ini telah bersetuju untuk mahkamah menangani beberapa persoalan undang-undang di bawah A 14A Kaedah-Kaedah Mahkamah 2012. Terdapat lapan persoalan yang dibangkitkan tetapi mahkamah berpendapat bahawa isu-isu penting terkandung dalam persoalan 2, 3 dan 4. Intipati daripada persoalan-persoalan tersebut adalah seperti berikut: (i) sama ada memandangkan akaun pertama tidak mempunyai penamaan, LOA tersebut dengan peruntukan Akta Probet dan Pentadbiran 1959 harus diutamakan ('persoalan 2'); (ii) sama ada akaun kedua yang mempunyai penamaan kepada Dharsyaini untuk menerima jumlah kredit dalam akaun ini yang telah didaftarkan dan disimpan dengan sewajarnya oleh Lembaga KWSP adalah sah ('persoalan 3'); dan (iii) sama ada Lembaga KWSP diberi kuasa untuk menggabungkan kedua-dua akaun tersebut semasa hayat si mati apabila mendapati terdapat dua akaun di bawah nama si mati ('persoalan 4').

Diputuskan, menolak saman pemula dalam lampiran 1 tanpa perintah berkaitan kos:

(1) Penamaan yang dibuat dalam akaun kedua tersebut sememangnya sah kerana ia dibuat mengikut peruntukan Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP'), Peraturan-Peraturan Kumpulan Wang Simpanan Pekerja 2001 ('Peraturan KWSP') dan Kaedah-Kaedah Kumpulan Wang Simpanan Pekerja 1991 ('Kaedah KWSP'). Setelah meneliti peraturan 7(1) Peraturan KWSP yang memperuntukkan tentang penghentian penamaan, mahkamah bersetuju dengan defendan bahawa tiada satu pun keadaan seperti yang digariskan dalam peraturan 7(1) telah dicetuskan atau digunakan dalam kes ini. Memandangkan penamaan kekal sah, menurut peraturan 9(2)(a)(i) Peraturan KWSP, Dharsyaini berhak mendapat baki jumlah dalam akaun pertama apabila akaun ini digabungkan dengan akaun kedua. Mengambil kira perkara-perkara di atas, mahkamah menjawab persoalan 2 secara negatif dan persoalan 3 secara afirmatif (lihat perenggan 21, 23 & 25–26).

(2) Berhubung dengan persoalan 4, walaupun Akta KWSP, Peraturan KWSP, dan Kaedah KWSP tidak mengandungi peruntukan nyata yang memberikan defendan kuasa untuk menggabungkan akaun, tidak terdapat juga peruntukan dalam Akta, Peraturan dan Kaedah ini yang melarang tindakan tersebut. Oleh itu, mahkamah membuat kesimpulan bahawa defendan berhak menggunakan kuasa pentadbirannya untuk menggabungkan akaun-akaun tersebut. Berhubung dengan ini, defendan tidak mempunyai kepentingan dalam saman ini. Satu-satunya kebimbangannya adalah untuk melaksanakan kewajipan berkanunnya seperti yang dituntut daripadanya (lihat perenggan 31 & 34).]

Cases referred to

How Yew Hock (Executor of the Estate of Yee Sow Thoo, deceased) v Lembaga Kumpulan Wang Simpanan Pekerja [1996] 2 MLJ 474; [1996] 2 AMR 2161; [1996] 3 CLJ 1; [1996] 1 MLRA 25, FC (refd)

Krishnaveni Munusamy & Anor v Bawaneswary R Chinniah & Ors [2013] 10 MLJ 106; [2013] CLJU 90; [2013] MLRHU 123, HC (refd)

Legislation referred to

Employees Provident Fund Act 1991
Employees Provident Fund Regulations 2001 regs 7(1), 9, 9(2)(a)(i)
Employees Provident Fund Rules 1991 rr 7(1), 34
Probate and Administration Act 1959
Rules of Court 2012 O 14A

Jayanthi Devi a/p Balaguru (with K Sathia Devi) (JD Balaguru) for the plaintiff.
Noor Adzraii bin Noor Azhar (with Saifuddin bin Mohd Zin) (Employees Provident Fund) for the defendant.

Choong Yeow Choy JC:

INTRODUCTION

[1] Every contributor/member should have one main account (number) with the Employees Provident Fund. However, in the present matter before this court, the deceased contributor/member, Machap a/l Suppiah, had two main accounts (numbers) assigned to him. The accounts are:

(a) Account No 10458236; and

(b) Account No 13716036

[2] Machap a/l Suppiah in the present case did not make any nomination for Account No 10458236. However, he nominated one Dharsyaini a/p Vijaya Kumar as the beneficiary for Account No 13716036.

[3] There were funds remaining in Account No 10458236, but none left in Account No 13716036. Normally, this would have been the end of the matter. However, the situation was complicated when the Employees Provident Fund merged these two accounts into a single account. In the process, Account No 13716036 was subsumed into Account No 10458236. This action effectively deleted or erased Account No 13716036, leaving Machap a/l Suppiah with only Account No 10458236.

[4] The events described above led to competing claims between Dharsyaini a/p Vijaya Kumar, the nominee named in Account No 13716036, and the plaintiff, who serves as the administratrix of Machap a/l Suppiah's estate.

THE QUESTIONS FOR DETERMINATION

[5] The parties have reached an agreement for this court to address a number of legal questions under O 14A of the Rules of Court 2012.

[6] The questions couched by the parties are as follows:

Question 1:

Whether Machap a/l Suppiah (the deceased) has two accounts under the Employees Provident Fund namely:

(a) Account No 10458236; and

(b) Account No 13716036.

Question 2:

Whether as the Account No 10458236 has no nomination, the letters of administration granted by the Kuala Lumpur High Court vide OS No WA-31NCvC-996–03 of 2022 with the provisions of the Probate and Administration Act 1959 should take precedence?

Question 3:

Whether the Account No 13716036 which has a nomination to a Dharsyaini a/p Vijaya Kumar to receive the amount standing in credit in this account which was duly registered and retained for safekeeping by the Employees Provident Fund Board is valid?

Question 4:

Whether the Employees Provident Fund Board is vested with the power to merge Accounts No 10458236 and 13716036 during the lifetime of Machap a/l Suppiah on discovering there were two accounts under Machap a/l Suppiah?

Question 5:

In the even this honourable court answers No 4 in the affirmative, the following will be determined as to the nomination of the merged Account No 10458236.

Question 6:

If so, there was no nomination for Account No 10458236 registered and retained for safe-keeping by the Employees Provident Fund Board at the time

of the death of Machap a/l Suppiah, having regards that at all times the nomination is revocable until the death of the nominator?

Question 7:

Whether the Employees Provident Fund Board's records at the time of the death of Machap a/l Suppiah showed that the Account No 10458236 had no nomination registered with the credit of RM55,363.26 and hence the advice of the Employees Provident Fund Board to Divyyaa a/p Machap to apply and obtain the letters of administration under the provisions of the Probate and Administration Act 1959 is valid and Divyyaa a/p Machap is deemed the recipient?

Question 8:

Whether the Employees Provident Fund Board's records at the time of the death of Machap a/l Suppiah showed that the Account No 13716036 had the nomination of Dharsyaini a/p Vijaya Kumar registered and in safe-keeping of the Employees Provident Fund Board with no credit?

[7] This court holds the view that the pivotal issues in this case are encapsulated in questions 2, 3, and 4.

THE PARTIES AND THE BACKGROUND FACTS

[8] The plaintiff, Divyyaa a/p Machap, is the biological daughter of Machap a/l Suppiah.

[9] The defendant, Kumpulan Wang Simpanan Pekerja ('KWSP') or Employees Provident Fund ('EPF') is Malaysia's foremost pension fund. It was established in 1951 to help the Malaysian workforce save for their retirement in accordance to the Employees Provident Fund Act 1991.

[10] Machap a/l Suppiah passed away on 17 July, 2021. Thereafter, the plaintiff made the following averment in her statement of claim in a writ action that she had commenced against the defendant on 15 December, 2022.

1. Plaintif telah dinasihati oleh pegawai Kumpulan Wang Simpanan Pekerja agar memohon satu Surat Kuasa Mentadbir untuk pengeluaran KWSP simati MACHAP A/L SUPPIAH (K/P NO: 680106–04–5373/A0999502) NO AKAUN: 10458236.
2. Plaintif telah memohon dan memperolehi Surat Kuasa Mentadbir No: WA-31NCvC-996–03/2022 untuk harta pusaka simati MACHAP A/L SUPPIAH (K/P NO: 680106–04–5373/A0999502) bertarikh 31–05–2022 berdasarkan semakan awal dilakukan pada ketika itu.

3. Plaintif telah melalui firma peguamcaranya, Tetuan JD Balaguru menghantar satu surat bertarikh 19–09–2022 kepada Defendan mengenai tuntutan pengeluaran KWSP simati MACHAP A/L SUPPIAH (NO AKAUN: 10458236) oleh Plaintif.

4. Plaintif telah sekali lagi melalui firma peguamcaranya, Tetuan JD Balaguru menghantar satu lagi surat peringatan bertarikh 10–11–2022 kepada Defendan mengenai tuntutan pengeluaran KWSP simati MACHAP A/L SUPPIAH (NO AKAUN: 10458236) oleh Plaintif.

5. Pada 01–12–2022, Plaintif telah menerima satu surat daripada Defendan yang bertarikh 24-11-2022 dan ditandakan 'TANPA PREJUDIS' di mana Plaintif dinasihatkan bahawa sekiranya Plaintif mempunyai bantahan terhadap penamaan yang dibuat oleh mendiang bapanya semasa hayatnya, Plaintif dinasihatkan untuk menggunakan saluran perundangan dengan memfailkan Injuksi Mahkamah atau Saman Pemula daripada Mahkamah Tinggi (Sivil) dan menamakan Lembaga KWSP sebagai responden.

[11] The root cause for the filing of this action by the plaintiff against the defendant can be attributed to two decisions and/or actions taken by the defendant. The first is their decision in merging the two accounts into a single account and the second was their decision that the nomination of Account No 13716036 is deemed automatically the nomination for Account No 10458236. These decisions meant that the monies that were in originally in Account No 10458236 are now subject to a claim by both Dharsyaini a/p Vijaya Kumar, the beneficiary nominated for Account No 13716036 and the plaintiff, the administratrix of Machap a/l Suppiah's estate.

THE PARTIES' CONTENTION

[12] The plaintiff's contentions were simply that first, the deceased member Macha a/l Suppiah did not make any nomination for Account No 10458236 under reg 9 of the Employees Provident Fund Regulations 2001. However, the plaintiff did concede and did not challenge the fact that the deceased member Macha a/l Suppiah did make a nomination on 7 April 2014 for Account No 13716036 under reg 9 of the said Regulations. The beneficiary named being Dharsyaini a/p Vijaya Kumar.

[13] Following the above, the plaintiff's argument was that the letters of administration granted by the Kuala Lumpur High Court vide OS No WA-31NCvC-996–03 of 2022 under the provisions of the Probate and Administration Act 1959 applies to Account No 10458236.

[14] A parallel submission made by the plaintiff was that the defendant is not vested with any power to merge the accounts of the plaintiff.

[15] As far as the defendant was concerned, it was merely exercising its administrative power when it merged the two accounts.

[16] More importantly, the defendant argued that the nomination made in Account No 13716036 had complied with the provisions of the Employees Provident Fund Act 1991, the Employees Provident Fund Regulations 2001 and the Employees Provident Fund Rules 1991. That statutory nomination can only be 'diberhentikan' or become 'terbatal' under one or the circumstances expressly provided for in reg 7(1) of the Employees Provident Fund Rules 1991 and that did not happen in the present case. Hence, the nomination remains valid despite the merger of the accounts.

THIS COURT'S DECISION

[17] The answer to question 1 is undisputable and it is in the affirmative. The reason being the deceased Machap a/l Suppiah had registered himself as a member on 10 March 1984 using his old identity card bearing the No A009502. For this he was assigned the Account No 10458236. However, on 1 August, 1995, the deceased Machap a/l Suppiah had registered himself as a member for the second time, using his new identity card bearing the No 680106–04–5373. On this occasion, he was assigned with Account No 13716036.

[18] The answers to questions 2 and 3 are crucial for the determination of this matter. Before this court answer both of these questions, it is apt that we recap the arguments advanced by the parties.

[19] As Account No 10458236 was without any nomination, the plaintiff reasoned that the letters of administration granted by the Kuala Lumpur High Court vide OS No WA-31NCvC-996–03 of 2022 under the provisions of the Probate and Administration Act 1959 applies to this account. Accordingly, the plaintiff contended that the answer to question 2 should be in the affirmative.

[20] The defendant argued instead that since the two accounts have been merged and the nomination from Account No 13716036 remains as a valid nomination, the question of the application of the Probate and Administration Act 1959 does not arise. The logic of this argument being that the accounts have been merged and the nomination was in no way affected by the merger of these accounts.

[21] The nomination made in Account No 13716036 was indeed valid as it was made in accordance with the provisions of the Employees Provident Fund Act 1991, the Employees Provident Fund Regulations 2001 and the Employees Provident Fund Rules 1991. That was a statutory nomination as

explicated by the Federal Court in *How Yew Hock (Executor of the Estate of Yee Sow Thoo, deceased) v Lembaga Kumpulan Wang Simpanan Pekerja* [1996] 2 MLJ 474; [1996] 2 AMR 2161; [1996] 3 CLJ 1; [1996] 1 MLRA 25. This point was conceded by the plaintiff.

[22] Regulation 7(1) of the Employees Provident Fund Regulations 2001 provides as follows:

> 7 Penghentian Penamaan
>
> (1) Sesuatu penamaan hendaklah terhenti berkuat kuasa —
>
> (a) apabila orang yang dinamakan mati, atau, jika terdapat lebih daripada seorang orang yang dinamakan, apabila semua orang yang dinamakan mati, semasa hayat ahli itu;
>
> (aa) apabila institut yang dinamakan digulungkan atau dibubarkan;
>
> [Mas. P.U. (A)382/2016]
>
> (b) dengan notis pembatalan yang dibuat dalam borang KWSP 4A;
>
> [Pin. P.U. (A) 382/2016]
>
> (c) dengan apa-apa penamaan yang dibuat kemudiannya dalam borang KWSP 4; atau
>
> [Pin. P.U. (A) 382/2016]
>
> (d) bagi ahli yang beragama Islam, jika —
>
> (i) Orang yang dinamakan belum mencapai umur lapan belas tahun apabila permohonan pengeluaran di bawah perenggan 54(1)(a) Akta dibuat oleh orang yang dinamakan itu atau warisnya; atau
>
> (ii) Tiada permohonan pengeluaran di bawah perenggan 54(1)(a) Akta dibuat oleh orang yang dinamakan dalam tempoh satu tahun dari tarikh kematian ahli.
>
> [Pin. P.U. (A) 382/2016]

[23] Upon an examination of reg 7(1), this court is in agreement with the defendant that the none of the circumstances as outlined in reg 7(1) has been triggered or invoked in this case.

[24] In addition, this court takes cognisance of regs 7(2) and 7(3) which state as follows:

> (2) Penamaan yang disebut dalam subperaturan (1) tidaklah terbatal dengan apa-apa wasiat atau apa-apa perbuatan, peristiwa atau cara lain.
>
> (3) Jika terdapat lebih daripada seorang orang yang dinamakan dan salah seorang daripada orang yang dinamakan itu mati terlebih dahulu daripada ahli, maka, jika

tiada apa-apa penamaan yang dibuat kemudiannya oleh ahli itu bagi melupuskan bahagian orang yang dinamakan yang telah mati itu, bahagian itu hendaklah kembali kepada harta pusaka ahli itu.

[25] Since the nomination remains valid, this court agrees with the defendant that in accordance with reg 9(2)(a)(i) of the Employees Provident Fund Regulations 2001 (which deals with 'pembayaran atas kematian ahli jika ada penamaan'), Dharsyaini a/l Vijaya Kumar is entitled to the balance sum in Account No 10458236 when this account was merged with Account No 13716036.

Regulation 9(2)(a)(i) of the Employees Provident Fund Regulations 2001 reads as follows:

(2) Jika seorang ahli mati dan terdapat penamaan dibuat mengikut Peraturan-Peraturan ini —

(a) orang sebenar yang dinamakan itu hendaklah menerima amaun yang berada pada kredit ahli yang mati itu —

(i) dalam hal ahli yang bukan beragama Islam, sebagai seorang benefisiari;

...

[26] In view of the above, the answer to question 2 is in the negative while the answer to question 3 is in the affirmative.

[27] On whether the Employees Provident Fund Board is vested with the power to merge the two accounts, the plaintiff's position is that the defendant is not vested with any power to merge the accounts of the plaintiff while the defendant maintained that it was merely exercising its administrative power to merge the accounts.

[28] In addressing this point, the plaintiff reverted to the following argument, that is, the deceased Machap a/l Suppiah did not make a second or subsequent nomination, citing r 34 of the of the Employees Provident Fund Rules 1991 which reads as follows:

34 Nominations to be made in Form EPF 4.

(1) Every nomination shall be made in writing in Form EPF 4 and shall be signed by the member of the Fund in the presence of a witness, and the signature of such member shall be attested by the witness.

(2) Where a member of the Fund having made a nomination in accordance with these Rules wishes to make a second or subsequent nomination he shall complete and forward a fresh Form EPF 4 containing such nomination.

(3) A nomination shall be of no effect unless the Form EPF 4 duly completed is sent and reaches the Board during the lifetime of the member.

A

(4) Every nomination form registered shall be retained in safe-keeping by the Board.

(5) Any person who attests the signature of the member of the Fund in respect of a nomination shall be disqualified from any benefit thereunder.

B

[29] The plaintiff further referred this court to the decision of the High Court in *Krishnaveni Munusamy & Anor v Bawaneswary R Chinniah & Ors* [2013] 10 MLJ 106; [2013] CLJU 90; [2013] MLRHU 123 which had alluded to the said r 34.

C

[30] The core argument made by the plaintiff is that 'it is not within the powers of the defendant to deem that the nomination made by the deceased for the Account No 13716036 is automatically to be treated as the nominee for the Account No 10458236, bearing in mind that there is no fresh nomination in the prescribed Form EPF 4 containing such nomination and retained in safe-keeping by the Board for Account No 10458236'.

D

[31] While it is true that the Employees Provident Fund Act 1991, the Employees Provident Fund Regulations 2001, and the Employees Provident Fund Rules 1991 contain no express provisions granting the defendant the power to merge accounts, there are equally no provisions within these Act, Regulations, and Rules that prohibit such action. Therefore, this court concludes that the defendant is entitled to exercise its administrative powers to merge the said account.

E

F

[32] In view of the findings by this court as to the issues raised in questions 2 and 3 (in paras [19] to [26]) and in question 4 (in paras [27] to [31]), this court is of the considered view that the answers to questions 6, 7 and 8 are self-evident.

G

[33] This is one case where the outcome will be devastating to either the claimants, namely, the plaintiff and Dharsyaini a/l Vijaya Kumar. It is unfortunate that only one of these claimants will be entitled to the proceeds in the account of Machap a/l Suppiah that is with the defendant.

H

[34] The defendant has no vested interest in the present suit. Its only concern is to perform its statutory duties as demanded of it.

I

[35] It is acknowledged that Machap a/l Suppiah did not make a new nomination or renominate Dharsyaini a/p Vijaya Kumar after the accounts were merged. However, it is equally important to note that he did not cancel the existing nomination of Dharsyaini a/p Vijaya Kumar either.

[36] This case is unprecedented, and the court must proceed by thoroughly examining and applying the existing provisions of the 'law'. An interpretation of these provisions supports the position advocated by the defendant.

[37] The originating summons in encl 1 is dismissed.

[38] This court is of the view that, considering the circumstances of the case, an order of no costs is fair.

Originating summons in encl 1 dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar